TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~486.~~ 219

JAMES H. REES, APPELLANT,

vs.

THE CITY OF WATERTOWN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

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SUPREME COURT OF THE UNITED STATES.

No. 436.

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THE CITY OF WATERTOWN.

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1 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held, according to law, at the city of Madison, in said district, on the first Monday (being the third day) of June, A. D. 1872, and on the 21st day of said term, to wit, on the 10th day of July, A. D. 1872—present, the Honorable Thomas Drummond, United States circuit judge for the seventh judicial circuit, and the Honorable James C. Hopkins, district judge, presiding.

Among other, the following proceedings were had, to wit:

JAMES H. REESE
vs
THE CITY OF WATERTOWN. } In equity.

Be it remembered that, heretofore, to wit, on the 17th day of March, A. D. 1871, came the above-named complainant, by his solicitors, Messrs. H. W. and D. K. Tenney, and file his bill of complaint against the above-named defendant, as follows:

2 In chancery.

To the judges of the circuit court of the United States for the western district of Wisconsin:

James H. Reese, of the city of Chicago, and a citizen of the State of Illinois, brings this his bill against the city of Watertown, which is a municipal corporation, created by and existing under the laws of the State of Wisconsin, and situated in the western district of Wisconsin; and thereupon your orator complains & says, that said city of Watertown was incorporated as a city by an act of the legislature of the State of Wisconsin, approved March 3d, 1853, being chapter 45 of the private and local laws of 1853; and that it was immediately thereafter organized as a city under and according to said charter, and has ever since continued to exist as such. That, by an act of the legislature of the State of Wisconsin, approved March 12, 1856, being chapter 127 of the private & local laws of that year, and entitled "An act to authorize the city of Watertown to aid in the construction of the Chicago, St. Paul, and Fond du Lac Railroad, and the Watertown and Madison Railroad," it was, among other things, enacted as follows:

3 SECTION 5. For the purpose of aiding in the construction of the Watertown and Madison Railroad, the mayor and city council of said city of Watertown are hereby authorized to subscribe to the capital stock of said corporation to an amount in the aggregate of two hundred thousand dollars, upon such terms and conditions as may be agreed on by and between the said railroad company and the said mayor and city council, and to execute, issue, and deliver to the said railroad company city bonds in payment thereof to the aforesaid amount of two hundred thousand dollars, which said bonds shall be redeemable in twenty years from the first day of January next, with interest at the rate of eight per cent. per annum, payable semi-annually, and the interest and principal payable in the city of New York.

SECTION 9. For the payment of the principal and interest upon any bonds authorized to be issued in pursuance of the provisions of this act, the faith of said city is hereby irrevocably pledged; and whenever it shall become necessary, for the purpose of paying the interest due

and to become due on any of said bonds, or the principal of such bonds, the said mayor and city council shall be, and are hereby, authorized and required to levy and collect a tax upon the taxable property of
4 said city, sufficient for that purpose.

That, by virtue and in pursuance of said act, the said city did thereafter, during the same year, subscribe to the capital stock of said Watertown and Madison Railroad Company to the amount of two hundred thousand dollars, on terms then and there agreed on by and between said railroad company and the mayor and city council of said city, and did execute and deliver to said railroad company the bonds of said city in payment therefor to the amount of two hundred thousand dollars, in conformity with the terms of said act. Said bonds were issued in denominations of one thousand dollars each, and had coupons attached thereunto for the respective payments of interest, all payable to the bearer thereof. And the said city of Watertown, by said bonds & coupons, promised to pay to the bearer thereof, respectively, the sums therein mentioned, at the times therein mentioned, in consideration of value received by said city as aforesaid. That said bonds were thereafter sold by said railroad company to various persons to procure money for the building of said railroad, and they thereafter passed from hand to hand as negotiable securities in the money-markets of the country.

5 That your orator, about ten years ago, for valuable consideration and in good faith, purchased and became the owner of nine of said bonds so issued in aid of the Madison and Watertown Railroad, and he has ever since owned and held them. That said city neglected and refused to pay the coupons attached to said bonds as they became due, and your orator, at different times thereafter, brought several suits against said city to recover the amounts due on said coupons, in which suits your orator recovered judgments against said city as follows: In the circuit court of the United States for the district of Wisconsin, on the 16th day of September, 1867, he recovered a judgment for one thousand eight hundred and sixty-eight dollars and thirty-one cents. In the same court, on the 9th of January, 1868, he recovered a judgment for five thousand eight hundred and fifty-one dollars and forty cents; and in the same court, on the 12th day of April, 1870, he recovered a judgment for one thousand five hundred and fifty-one dollars and thirty-five cents. In the summer of 1870 the former district of Wisconsin was divided into two districts, the city of Watertown being in the western district. And your orator thereafter brought suit in the circuit
6 court of the United States for the western district of Wisconsin against said city, upon the three judgments above described, and such proceedings were therein had that, on the 3d day of February, 1871, he recovered a judgment against said city for the sum of eleven thousand and sixty-six dollars and eighty-nine cents. The said city has never paid anything upon any of said judgments, or upon said bonds or coupons, although often requested, but has wholly repudiated its obligations in that behalf, and has at all times refused to make any provision therefor.

Your orator further states that, in the summer of 1868, he caused executions to be issued on the two judgments first above described, which executions were returned wholly unsatisfied, in October, 1868, the marshal certifying thereon that he had not been able to find any property whereon to levy.

That, on the 13th day of November, 1868, at the instance and on the relation of your orator, a peremptory writ of mandamus was issued from

the circuit court of the United States for the district of Wisconsin, commanding the mayor and city council of said city immediately to levy and collect a tax upon the taxable property of said city to pay and satisfy said judgments; which writ was placed in the hands
7 of the marshal for service, but, before said writ could be served, and for the purpose of preventing the service thereof, and the execution of the precept of said writ, all but six of the members of the city council of said city resigned their offices as members of said council, whereby the number remaining in office was reduced below the number capable of executing the command of said writ. The marshal served the writ on the mayor and clerk and all the six alderman in office, and so returned certifying that the rest had resigned. Said board of alderman, when full, was composed of fourteen members, and a majority of that number was required for the levy of the tax as hereinafter stated. Nothing was done towards levying such tax in the year 1868.

That, on the 3d day of May, 1869, another board of alderman having been elected, an alias writ of mandamus was issued out of, and under the seal of, said court, on the relation of your orator, returnable on the first Monday of June, 1869, by which said mayor and city council of the city of Watertown were commanded, as they had been before commanded, immediately to levy and collect a tax on the taxable property in said city sufficient to pay said judgments and to collect it as a
8 part of the next annual taxes, and pay the same over to your orator in satisfaction of said judgments. Said writ was duly served on the mayor of said city and on thirteen out of the fourteen alderman, on the 6th day of May, 1869, by the marshal of said district. The alderman not served, John Holiger by name, was said to be sick with the small-pox, which was the reason why he was not served.

That no step was taken towards obeying said writ, but, on the contrary, said officers declared that they would not obey it; and that the state of feeling was such among the citizens, a large proportion of whom were Germans, that they would not attempt to obey it without great danger of personal violence.

That, on the 6th of October, 1869, your orator, upon affidavit of the foregoing facts, applied for and procured an order from said court requiring the said mayor and thirteen alderman to show cause before said court on the 2d Monday of November, 1869, why they should not be punished for their contempt of said court in neglecting and refusing to obey said writ of mandamus, which notice was duly served on all of them.

That, before the return-day of said order, six of said alderman resigned their said offices, leaving in office but one more than a
9 quorum; one of those left being the said John Holiger, who had not been served with the writ. On the return day of said order, a part of said alderman appeared with their counsel before said court, and after a hearing of the case, the said court adjourned or reserved its decision thereon till the next January term, at the same time solemnly admonishing said alderman to obey the precept of said writ before that time.

That, at the said January term, 1870, the matter was again brought before said court, and the seven alderman, who had been served with the writ, and not resigned, appeared with their counsel, and showed cause why they should not be punished for their contempt of said court. They produced affidavits and proofs showing that, since the resignation of their brethren, they had held several meetings, at the end of which,

after all other business was done, a resolution had been introduced to levy a tax, as required by said writ of mandamus, but, as soon as it was done, it was always discovered that the said John Holiger was missing, and no quorum was present. That, thereupon, on such occasions the city-marshal was dispatched after the said Holiger, but never was able to find him. That, after repeated failures to get a quorum in this way, they had ordered a special election to fill the vacancies in the board, and divers men had been voted for and elected, but they had all refused to qualify, wherefore they had been unable to obey the command of said writ.

That the court thereupon further adjourned its decision and issued a special mandamus, commanding said Holiger to unite with the other alderman and all to levy and collect the tax as commanded in the former writ. Said special mandamus was immediately placed in the hands of the marshal for service; but before he was able to reach said Holiger he had resigned his said office and was no longer able to act.

That, in the succeeding month of May, your orator, by his counsel, again brought said matter before said court, and said alderman, as well those who had resigned as those who had not, appeared with their counsel and showed cause why they should not be punished for their contempt of said court. Those who had not resigned showed that they had not been able to obey the writ, for the reasons aforesaid, and those who had resigned showed that they had left a quorum in office and supposed they would of course obey the writ, and thereupon the court adjudged those who had not resigned to be not guilty, and fined four of those who had resigned $50 each, to apply towards the costs of the proceedings.

Your orator further shows that, on the eighth day of October, 1870, at the instance of your orator, a pleuris writ of mandamus was issued out of and under the seal of said court, commanding the mayor and common council of said city, as they had often before been commanded to levy and collect a tax to pay said judgments, which writ was placed in the hands of the marshal of said district for service. But said marshal, on going to serve said writ, found there were only seven alderman in office, on whom he served the same, the rest having all resigned. And your orator alleges that, as he has since learned, in the spring of 1870, a full board was elected and duly qualified, and they held one meeting immediately after, having first taken such precautions as to make the service of a mandamus on them impossible. At this meeting they levied the annual taxes of the city, although the regular time for doing so was not till the November following, and they did up all the other city business for the year, as far as they could, and then, at the end of the meeting, seven of them resigned, and there has been no quorum since. A special election was afterwards ordered to fill the vacancies, but no votes were cast, except that three votes were cast in one ward; but the man for whom they were cast refused to qualify, and there is not now, and has not been for the past year and a half, except at the one evening above stated, any legal quorum of said board of alderman capable of levying a tax according to law.

Your orator alleges that all these shifts and devices by which the levy of a tax has been prevented and the commands of the court set at naught have been contrived and executed by and between the citizens of Watertown and their officers acting in concert for that purpose; and that they, each and all, have at all times evinced and declared a settled purpose not to pay the indebtedness of the city upon said bonds, and a determination to resort to any means to prevent such payment. No tax

has ever been levied to pay any part of it, and the interest has been allowed to accumulate for fourteen years, during which time the city has enjoyed a practical exemption from the burden of its debt.

Your orator further states that, for the purpose of preventing the payment of said indebtedness, and thwarting all the efforts of their
13 creditors to collect the same, the said city and its citizens, have from time to time procured from the legislature of the State of Wisconsin divers amendments of their charter and other acts craftily devised for the purpose of hindering, delaying, and defrauding their creditors, making the collection of such taxes difficult or impossible, and thwarting whatever process might be issued by courts to compel the payment of such indebtedness; and among others they have procured the passage of the following described acts and provisions, to wit:

Chapter one hundred and twenty-four (124) of the general laws of 1861—an act to enable said city to compromise with its creditors.

This act provides, among other things, that new bonds, not exceeding $80,000 in all, may be issued to take up the old ones, which were then more than four times that amount; but they were only to be issued upon such a compromise that the $80,000 new bonds would take up all the old ones and the penalty of fine and imprisonment was imposed for delivering them on any other terms.

Chapter two hundred and thirty-three (233) of the generall aws of 1865—amended & consolidated charter.

Section two (2) of chapter five (5) provides that the tax annually levied for city general purposes, and to defray the expenses of the city general fund shall not exceed one-fourth of one per cent. per an-
14 num. This sum was barely sufficient to pay the current expenses of the city. Section twelve (12) chapter nine (9) of the same act repeals section nine (9) of chapter one hundred and twenty-seven, (127,) of the private and local laws of 1856, being that by which the faith of the city was irrevocably pledged for the payment of this indebtedness, and by which it was made the duty of the mayor & council to levy and collect taxes for the payment of it.

Chapter one hundred and sixty-three (163) of the private and local laws of 1866.

This provides that no execution shall issue against said city till ninety days after judgment, and then only on special application to the court. It also again repeals said section nine of chapter one hundred and twenty-three of the laws of 1853.

Chapter four hundred and forty-nine (449) of the private & local laws of 1866, to enable the city to compromise its debts.

This act provides for the issue of not exceeding $50,000 of new bonds to extinguish its entire indebtedness.

Chapter sixty-one (61) of the private and local laws of 1867.

This provides that any officer may resign by a writing, addressed to the mayor, and that such resignation "shall take effect from the time of filing the same." It also provides that the annual tax shall
15 not exceed one-fourth of one per cent., and that on the application of any tax-payer, injunctions may issue to restrain

the levy or collection of any tax when the proceedings are not in pursuance of law.

Chapter two hundred and thirty-six (236) of the private and local laws of 1868.

This provides that "all laws, resolutions, &c., assessing a tax, &c., shall be passed by an affirmative vote of a majority of all the members composing the common council," and by ayes & noes: Provided that in all other matters "an affirmative vote of a majority of a quorum shall be sufficient.

Chapter two hundred and twenty-seven (227) of the private and local laws of 1869, makes further provision of the same kind, and provides for injunctions upon tax-proceedings.

Chapter four hundred and fifty-three (453) of the private & local laws of 1869, provides for a compromise of the city debt, but restricts the amount to be paid to fifty per cent. of the principal.

Chapter seventy-two (72) of the private and local laws of 1870, to enable the city to compromise its debts.

This act provides for the issue of new bonds "to the amount in all of fifty per cent. of the principal of all bonds outstanding," and provides that in no case shall more than fifty per cent. of the principal be
16 paid, "exclusive of all unpaid interest-coupons or judgments."

Chapter one hundred and sixty-three (163) of the private and local laws of 1870.

This provides that when any taxes are levied to pay anything on city bonds, coupons, or judgments, such tax shall be put in a separate list, and all proceedings thereupon shall be carried on separately and in a different way from those in regard to other taxes. It provides that if no bid shall be made for any lot offered for sale for such taxes, the treasurer shall adjourn such sale from time to time, not exceeding six months at a time. The former provisions requiring the county to bid in when there was no other bidders is abrogated. The act further provides for injunctions to restrain any tax-proceedings when not in pursuance of law. It also provides that all laws, ordinances, resolutions, or orders levying or assessing a tax "shall be passed by an affirmative vote or a majority of all the fourteen alderman constituting the common council," but that in other proceedings "an affirmative vote of a majority of a quorum shall be sufficient." It also provides that when there is not a quorum, seven alderman may audit accounts for repairs of bridges
17 and streets, and in case of vacancy in the office of mayor, they may draw orders on the treasurer for the amount so audited. Several other provisions of like character, and tending to the same end are embodied in the law above referred to and in other acts.

Said city of Watertown contains about eight thousand inhabitants. The assessed value of the property therein is about two million dollars. The amount of its outstanding bonds is about two hundred and sixty thousand dollars of principle, with interest thereon from the time they were issued. Of this amount it is expected that the railroads to which bonds were issued will be compelled to re-imburse the city to the amount of seventy or eighty thousand dollars of principal and the interest thereon. The city corporation owns no property, and its only means of paying its debts is by levying taxes upon the property of the citizens.

Your orator says, in view of the facts above stated, that he is remediless at law. There is no body or power in the city of Watertown able in law, to levy or collect a tax, or to pay the indebtedness to your orator, and nothing upon which a writ of mandamus can operate. Said city, by the acts above referred to, has placed itself in a position
18 where it can exist and carry on its ordinary business without any such body, and its arrangements are such that in case of necessity, it secures a legal quorum in five days which can meet and do any necessary business and dissolve before any writ of mandamus can be issued or served. The members, being provided with written resignations, could perfect their resignations after the United States marshal was actually in the council-room, before he could serve it on them, and said city has shown, by its acts, its determination to work these devices to the utmost to prevent the levy of any tax for the payment of its indebtedness.

Your orator therefore asks the aid of this honorable court in the premises, and prays that in some equitable and efficient way, to be determined by your honors, the taxable property in said city of Watertown may be subjected to the payment of the amount due your orator as aforesaid, and that said amount may be paid; and your orator represents that the citizens of Watertown, in reality owe said debt, and it is a just charge upon their property. That so far as the payment of corporate debts is concerned, the corporate authorities are in the nature of a trustee for
19 the benefit of creditors, and the property of the citizens a trust-fund, and that in case of the non-existence or misconduct of such trustee, the right and duty devolves upon this court to lay hold upon the trust-fund and administer it for the payment of such debts as justice and equity requires, and through its own officers. Your orator therefore prays that a decree may be made subjecting the taxable property of the city of Watertown to the payment of the indebtedness due to your orator as aforesaid, and empowering and requiring the marshal to seize and sell so much of it as may be necessary to raise the amount due to your orator and the costs of this action and pay it over to him, and for such other or further relief as may be agreeable to equity.

May it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, to be directed to the city of Watertown, commanding said city by a certain day, and under a certain penalty therein to be inserted, to be and appear before this honorable court and then and there to answer the premises; and further to stand to and abide by such order and decree therein as shall be agreeable to equity and good conscience.

20 And your orator will ever pray, &c.

H. W. & D. K. TENNEY,
Sol's & Counsel for Compl't.

STATE OF ILLINOIS, *Cook County, ss:*

H. W. Tenney, being duly sworn, deposes and says that he is one of the solicitors for the complainant in the above action, and that he has read the above bill and knows the contents thereof; and that the allegations therein are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that he has had charge of & conducted all the legal proceedings on the part of the complainant mentioned in the foregoing bill, and that he has frequently visited the city of Watertown and conferred with its officers and citizens in regard

to the matters alledged in said bill, and that he has personal knowledge of most of the material matters therein alleged, and that the complainant has no knowledge thereof except as informed by deponent, which is the reason why this verification is made by deponent.

H. W. TENNEY.

Subscribed & sworn to before me this 16th day of March, 1871.

PHILIP A. HOYNE,
U. S. Com., N. D. Illinois.

21 And same day, March 17, 1871, the complainant, by his solicitors, filed his præcipe for his writ of subpœna as follows:

Circuit court of the Uni'ed States for the western district of Wisconsin.

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In chancery.

To the clerk of said court: Please issue a writ of subpœna against the defendant in the above entitled action, returnable on the first Monday in May, 1871.

H. W. & D. K. TENNEY,
Sol't. for Complainant.

Whereupon a writ of subpœna issued as follows:

THE UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to the city of Watertown, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for
22 the western district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of May next ensuing, at Madison, to answer to a bill of complaint exhibited against you in our said court by James H. Rees. And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue. This process of subpœna is directed to the marshal of this district who is hereby commanded to serve the same upon the said The City of Watertown, if to be found in his district, and due return thereof make.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said district, this 17th day of March, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety fifth.

FRANK M. STEWART, *Clerk.*
By P. R. SANBORN, *Dep'y.*

H. W. & D. K. TENNEY,
Solicitor' for Complainant.

It is ordered by our said court that the said The City of Watertown, the defendant aforesaid, do enter its appearance in this suit
23 in the clerk's office, on or before the day and time at which this

subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

Subpœna returned served as follows:

"Served on the within The City of Watertown by delivering to Theodore Prentiss, the mayor and Franzill, the clerk of said city of Watertown, each of them personally a copy of this subpœna, this March 18, 1871.

"F. W. OAKLEY, *Marshal.*
"By W. S. MAIN, *Deputy.*

"Fees, 8.30."

APRIL 28, 1871.—This day came the defendant and filed its notice of appearance as follows:

United States circuit court, western district of Wisconsin.

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In equity.

Please enter my appearance as solicitor for the defendant in the above entitled action.

Yours, &c.

D. HALL.

24 JUNE 2, 1871.—This day came the defendant, by its solicitor, Mr. Hall, and filed its demurrer as follows:

United States circuit court for the western district of Wisconsin.

The demurrer of the city of Watertown, defendant, to the bill of complaint of James H. Rees, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint to be true, in manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant. Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

D. HALL, *Sol'r for Def't.*

ORTON, KEYES & CHYNOWETH,
Of Counsel.

25 We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

ORTON, KEYES & CHYNOWETH,
Of Counsel.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Theodore Prentiss, being duly sworn, deposes and says that he is the mayor of the city of Watertown, the defendant in the within and foregoing demurrer, and that he makes this affidavit for and in behalf of said defendant, and that the said demurrer is not interposed for delay.

THEODORE PRENTISS.

Subscribed & sworn to before me this 30th day of May, A. D. 1871.

C. B. SKINNER,
U. S. Court Commissioner.

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held at the city of La Crosse, on the first Monday (being the 4th day) of December, A. D. 1871, and on the third day of the term, to wit, on the 7th day of December, A. D. 1871—present, the Honorable Thomas Drummond, circuit judge, and the Honorable James C. Hopkins, district judge, presiding—the
26 following proceedings were had, to wit:

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In equity.

This day came the parties to this suit, by their counsel, and the issue raised by the demurrer interposed to complainant's bill of complaint herein, came on to be heard by the court; and, after hearing Mr. Tenney for the complainant, and Mr. Hall for the defendant, and the court, after being well advised of and concerning the same, it is ordered by the court that the demurrer interposed herein be and the same is hereby overruled, and leave granted the defendant to answer on or before the third Tuesday of February next.

FEBRUARY 17, 1872.—This day came the defendant, by its solicitor, Mr. Hall, and Messrs. Palmer, Hooker & Pitkin, of counsel, and filed its answer as follows:

Circuit court of the United States for the western district of Wisconsin.

The answer of the city of Watertown, defendant, to the bill of
27 complaint of James H. Rees, complainant.

This defendant, now and at all times hereafter, saving and reserving to itself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as it is advised it is material for it to make answer unto, answers and says: It admits the incorporation of defendant, the passage of the said act of March 12th, 1856, the subscription to the stock of the Watertown and Madison Railroad Company, and the delivery of bonds in payment therefor, the recovery of the judgments at law, the issue of the various writs of mandamus, the returns thereto, and the action of the court thereon, and the proceedings for contempt, and the action of the court thereon, as averred in said bill of complaint.

This defendant, further answering, admits that a full board of alderman was elected for said city in the spring of 1870, and at the third meeting they levied the taxes for that year, as it was right and legal for

them to do; but it denies that said board took such precautions
28 as to make the service of a mandamus on them impossible, or that they then did up all the other city business for the year, as far as they could. And this defendant denies the averment of said bill of complaint, that there has been no quorum since of said council.

This defendant, further answering, avers and shows that, in the month of April, 1871, at the regular spring election there was elected, and duly qualified a quorum of said board of alderman, which met twice openly and publicly for the transaction of the business of said city.

This defendant, further answering, denies the averment of said complaint, that no tax had ever been levied to pay any part of the indebtedness of said city, or that the interest has been allowed to accumulate for fourteen years, or that, during that time, the city has enjoyed a practical exemption from the burden of its debt.

This defendant, further answering, denies that any of the acts of the legislature of the State of Wisconsin mentioned in said bill have in any manner affected complainant's interests, or hindered the collection of complainant's judgment, or are in any manner involved in this case.

This defendant, further answering, admits that said city contains
29 a population of 7,553 inhabitants; that the entire assessment of the personal and real property on said city for the year 1870, was one million two hundred and forty-five thousand six hundred and twenty-five dollars, of which $981,580.00 was for real, and $264,045.00 was for personal property; and that the entire assessment of real and personal property in and for the said city for the year 1871, was one million ninety-seven thousand nine hundred and forty-five dollars, of which amount $867,005.00 was for real, and $230,935.00 for personal property; and this defendant denies that the assessment of real and personal property for the said years 1870 and 1871, in and for said city, exceeded or differed from the sums above stated in this answer.

This defendant admits that the outstanding bonds of said city amount to two hundred and sixty thousand dollars, principal, with interest at the rate of eight per cent. per annum thereon, secured by interest warrants or coupons to the said bonds attached, from the date of said bonds which makes the indebtedness of said city on said bonds and coupons at the time of verifying this answer, seven hundred and fifty thousand dollars, of which sum five hundred and fifty thousand dollars is already
30 matured and past due.

This defendant, further answering, denies that it is expected that the railroads to which bonds were issued will be compelled to re imburse said city to the amount of seventy or eighty thousand dollars or in any sum, or to any amount whatever.

This defendant further shows that, prior to 1856, the said city had outstanding eighty thousand dollars of eight per cent. bonds; that, under said act of 1856, it issued four hundred thousand dollars more of bonds, and about the same time twenty-five thousand dollars of what are termed improvement bonds. That the only voting ever done as to the issuing of bonds under the act of 1856, was under an ordinance of said city, which afforded no protection against illegal voting; that the voting thereon was largely done by non-residents of said city, consisting of a large force of railroad laborers, then thrown out of employment on the road now running from Watertown to Portage City.

That the business of Watertown was and is almost exclusively south and east; that it did not need the said road from Watertown to Madison, for which the said complainant's said bonds were issued; that the
31 construction of the last-named road was a positive injury to Wa-

tertown, which, before that time, enjoyed the almost exclusive trade of the region traversed by the same, which trade was almost entirely lost by its construction; that the amount of said bonds was so much in excess of the resources and ability of said city to pay, that they commanded but a small fraction of their par value in the market, and that said complainant, probably never gave more than twenty per cent. of the principal of said bonds for the same; that it was originally supposed and provided that the railroads were to pay all of said bonds; but by foreclosure and sale of the railroads the whole burden of said debt is left upon the said city, which it is impossible for it to pay.

This defendant further shows that it has settled, discharged, and procured the discharge and settlement of two hundred and thirty thousand of the principal of said bonds and the accrued interest thereon; that it has levied taxes to pay all sums of money necessary to effect such compromise, and is ready to compromise and settle all outstanding bonds and judgments at as high a rate as can be paid or collected of the people of Watertown.

32 This defendant further shows that the only reason why citizens of Watertown have refused in some instances to accept or hold office, is because they would be at once involved in litigation, and harrassed for not doing what could not be accomplished.

This defendant further shows, in defence of the whole of said bill of complaint, the following defences to the whole of the same:

First. That said complainant has never issued, or caused to be issued, any writ of mandamus, or taken any legal measures to enforce his said judgment, rendered by the circuit court of the United States for the western district of Wisconsin.

Second. That the bonds and coupons upon which said judgment set out in said complaint are founded, were not issued, and do not bear date until some time in the summer of 1856, and that they were all issued under and are subject to the provision of the charter of said city, approved March 29th, 1856, which says, "Nor shall any real or personal property of any inhabitant of said city, or any corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, *for* contract of said city.

33 Third. That the taxing power is vested exclusively in the legislature, to be exercised by such officers only as it prescribes, and for any court to undertake to wield it would be the exercise of a power unknown to our jurisprudence and laws, except where the power is granted to the court by express statute.

Fourth. That three-fourths of all the real and personal property in said city assessed, and liable to assessment, is exempt under the homestead exemption act, and the exemption laws relating to personal property from seizure, transfer, or sale, by virtue of any process, judgment, decree, or proceedings of any court, to pay said complainant said judgments, or any part of them.

Fifth. That all private property in the said city is wholly exempt from any process, judgment, decree, or order of this court to seize or sell the same, to enforce any judgment or decree against said city.

Sixth. That before the property of any citizen of defendant can be taken he should first be made a party to said bill, and that said bill is defective for the reason that it does not bring before this court the parties in interest whom it proposes to affect by the said bill.

34 Seventh. That the 5th & 6th wards of the city of Watertown are not in the western district of Wisconsin, nor within the jurisdiction of this court.

This defendant denies that the said city of Watertown has placed itself in a position where it can exist and carry on its ordinary business without a body able in law to levy or collect a tax, or to levy a tax to pay the said judgments of said complainant. This defendant further shows that every year since the incorporation of the said city, down to the present time, a full board of alderman has been elected in and for said city, at the regular charter election in the month of April, and a sufficient number to constitute a quorum of the common council of said city has thereupon qualified and voted taxes, and transacted the ordinary business of said city.

This defendant denies that the corporate authorities of said city are in the nature of trustees holding the property of its citizens in trust to pay corporate debts, or that any trust in relation thereto has devolved upon this court.

And these defendants deny all unlawful combination and confederacy in the said bill charged.

35 All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in that behalf most wrongfully sustained.

THEODORE PRENTISS, *Mayor.*

D. HALL, *Solicitor for Defendant.*
PALMER, HOOKER & PITKIN, *Of Counsel.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

On this 12th day of February, A. D. 1872, before me personally appeared Theodore Prentiss, and made oath that he is the mayor of the city of Watertown, the above-named defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true according to his best knowledge, information, and belief.

THEODORE PRENTISS.

Subscribed and sworn to before me this 12th day of February, 1872.

C. B. SKINNER,
U. S. Court Commissioner for the Western District of Wisconsin.

36 MARCH 2, 1872.—This day came the complainant by his solicitors and filed his replication, as follows:

Circuit court of the United States, western district of Wisconsin.

JAMES H. REES
vs.
CITY OF WATERTOWN. } In chancery.

The replication of James H. Rees, complainant, to the answer of the city of Washington, defendant.

The complainant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by this complainant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and

avoided, traversed or denied, is true. All which matters and
37 things this complainant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by his said bill he hath already prayed.

H. W. & D. K. TENNEY,
Sol's for Complainant.

MAY 29, 1872.—The following depositions were received and filed, and the same used on the trial of this cause:

Circuit court of the United States for the western district of Wisconsin

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In equity.

Testimony taken before the undersigned, Calvin B. Skinner, a court commissioner, & master and examiner in chancery, of said court, at the office of the undersigned in the city of Watertown, in the county of Jefferson, and State of Wisconsin, on the twenty-first day of May, 1872, at ten o'clock a. m. of that day, to be used on the trial of said above entitled cause on the part of said defendant.

38 ANTON FRANCLE, witness produced by the defendant, being duly sworn by me, says:

I am clerk of the city of Watertown; have been clerk since April, 1867. The date of the bonds, issued by the city of Watertown in aid of the Watertown and Madison Railroad, under chapter 127 of the private laws of the State of Wisconsin, of 1856, was June 1st, 1856. They were bonds, with coupons attached, for the payment of interest, semi-annually, at 8 per cent. per annum. There were two hundred of those bonds issued, at that time, for $1,000 each. The records of the city do not show any bonds issued in aid of that road under that or any other law, before that time. The records show that none of those bonds were delivered before that date. In February last, the amount of the indebtedness of said city of Watertown on bonds issued in aid of railroads, was seven hundred and fifty thousand dollars for principal and interest, of which sum, about five hundred and fifty thousand dollars was then & is now past due.

The annual valuation of all property in said city of Watertown, for the year 1870, was one million two hundred forty-five thousand six
39 hundred and twenty-five dollars, ($1,245,625,) of which $264,045 was personal property, and $981,580 was for real estate. The assessment of property in said city for the year 1871 was, for personal property $230,935, and for real estate $867,005, making a total of $1,097,940, as appears by the official assessment-rolls of said city for those years. In April, 1871, there was a full common council of said city, consisting of the mayor and fourteen alderman, elected and qualified, seven of whom held over from the previous year. They held a meeting, I believe, on the Monday after the charter election, April 11th, 1871, at which twelve alderman were present. The next meeting was on Monday, April 17, 1871, at which eight alderman, being a quorum, were present; four alderman had resigned after the first meeting and two had failed to qualify, leaving eight alderman in office.

The whole amount of bonds which have been issued by the city of Watertown, is as follows: $80,000 to the Milwaukee and Watertown

Railroad, under the law of 1853; $200,000 to the Watertown & Madison Railroad; and $200,000 to the Chicago, St. Paul & Fond du Lac Railroad, under the law of 1856; and $25,000 of city improvement
40 bonds, under a law of the same year, 1856. Of these bonds, about $232,000 of the principal has been settled, besides the interest on those settled. Upon computation, I find the actual amount so settled is $236,000, besides the interest on that sum, but as a part of such settlement, new bonds have been issued to the amount of $21,550; leaving the indebtedness, as before stated by me, at about $750,000, in February last, which is still outstanding, and unpaid and unsettled. The meetings of the common council in April, 1871, were open and public.

Cross-examined by H. W. Tenney, on the part of the plaintiff:

The third meeting of the alderman, after the charter election, in 1871, was a meeting of the board of street commissioners, on the 15th day of May, 1871. There were only seven alderman in office at that time. One had resigned the same day as the second meeting, Apr. 17th. There was no other meeting of the common council during that year at which there was a quorum present. There was no time from April 17th, 1871, until the charter election in April, 1872, when there *was* more than seven alderman in office. There are seven alderman in
41 office now. There *has* been only seven alderman in office this year—since the 8th day of April last. The charter election was on the 2d of April last. Twelve alderman were elected at the charter election in April, 1870, and two held over. They had their first meeting on the 11th day of April, 1870, at which all were present. The next meeting was May 2d, at which time only seven were present; that is all there *was* in office at that time. The others resigned April 11th—at the end of the previous meeting. There was a time between May 2d, 1870, and the election in April, 1871, when there *was* more than seven alderman in office. There was a special election held May 16th, 1870, at which time were elected two alderman; of whom only one qualified. The meeting of the common council was on the 19th of May, when eight were present. The next meeting was on May 25th, 1870, at which time there were nine alderman in office, and all were present. When I said only one qualified above, I meant only one qualified at the first meeting. Two resigned at the close of the meeting on May 25th. The next meeting of the common council, at which there were more than
42 seven aldermen, was on the 20th day of June, 1870. There were nine alderman then. Two had been elected meanwhile. Two resigned at the close of that meeting. The next meeting at which there *was* more than seven aldermen, was on the 29th day of August, 1870; there *was* then nine alderman in office. Two of them resigned at the close of the meeting. There was no meeting of the common council from that time up to April 11th, 1871, at which there *was* more than seven aldermen present; and no time, until April, 1871, at which time there were more than seven aldermen in office.

Redirect by D. Hall for defendant:

At every spring election, since I have been clerk, there *has* been a full common council elected, and a quorum qualified; and all of the meetings of said council have been open and public. Full public notice of all special elections for alderman, has been given according to law, and the meetings of the common council, after such elections, have always been open and public.

ANTON FRANCL.

Subscribed and sworn to before me this 21st day of May, 1872.
C. B. SKINNER,
U. S. Court Commissioner, & Master & Examiner in Chancery.

43 CHARLES BEEKMAN, a witness produced by defendant, being duly sworn by me, says:

Myself and Michael J. Gallagher are the present assessors of the city of Watertown, the defendant. I have been one of the assessors for the past four years. In my opinion quite two-thirds of the real estate, in the city of Watertown, consists of homesteads, owned and occupied by residents of said city; that is, of not to exceed a quarter of an acre of land, and the dwelling-house thereon, owned and occupied by the owner thereof, who is a resident of said city, which homesteads are exempt from sale on execution, or any other final process under section 23, of chapter 134, of the Revised Statutes of the State of Wisconsin. I mean quite two-thirds or more in value of said real estate consists of such exempt homesteads. In my opinion two-fifths of all the personal property, in said city, is exempt from seizure or sale to pay contract debts under section thirty-one of said chapter 134, of said Revised Statutes. I mean personal property liable to assessment.

In my judgment, more then five-sixths of the exempt homesteads above-
mentioned, are owned by persons who have no other property,
44 except such as is exempt. In my judgment certainly more than five-sixths of all the exempt personal property, before mentioned, is owned by persons who have no other property except such as is exempt. In my opinion, not more than one-tenth of the population of Watertown have any property liable to sale on execution. I am a justice of the peace. Have been a justice of the peace for sixteen years at Watertown.

CHARLES BEEKMAN.

Subscribed and sworn to before me this 21st day of May, 1872.
C. B. SKINNER,
U. S. Court Commissioner, Western District Wisconsin.

MICHAEL J. GALLAGER, a witness produced on the part of the defendant, being duly sworn by me, says:

I am one of the assessors of the City of Watertown, the defendant, and am now engaged in making the assessment for this year. I have heard read the foregoing testimony, given by Charles Beekman, and in my opinion said testimony is correct, and the statements therein made true.

M. J. GALLAGHER.

Subscribed and sworn to before me this 21st day of May, 1872.
C. B. SKINNER,
U. S. Court Commissioner & Master & Examiner in Chancery.

45 THEODORE PRENTISS, a witness produced on the part of the defendant, being duly sworn by me, says:

I have been an attorney at law about twenty-seven years, ever since I have lived in Watertown; have been in active business during all that time, although not practicing law much now; have been in Watertown twenty-seven years, and am well acquainted here. In my opinion, about three-fourths of the property—real and personal property—in the

city of Watertown liable to assessment is exempt from execution, or other final process, under chapter 134 of the Revised Statutes. I mean three-fourths in value. A large majority of the inhabitants are laborers, or persons of small means, owning simply a homestead and a small amount of household furniture, all of which is exempt. A large part of the principal business property on Main street is occupied by the owners, they residing in the second stories of the buildings.

Business from Watertown is mainly south and east. The Watertown and Madison Railroad was not of as much advantage to the city of Watertown as some others. It was a disadvantage, as it cut off a great deal of business that formerly came here before that road was built. I should think it would take a tax of about $625,000 in the next
46 tax-roll to meet the amount now past due upon what are called the Watertown City Railroad bonds, allowing all the bonds to be legal, and leave the city still indebted, and not yet due, about $200,000. That amount could not possibly be collected should the tax be levied. The money is not here to pay it. The effect of attempting to levy such a tax would be to drive out the personal property and destroy the value of real estate. You could not collect one-quarter of that amount. The money is not here to pay it. When the Watertown and Madison Railroad bonds were issued by the city they were sold, to my knowledge, as low as ten cents on the dollar of the face. They were so sold for the reason that the city bonds issued in aid of railroads were so largely in excess of the resources of the city to pay. They have never, so far as I know, commanded a price of more than a small fraction of their face. I have had them offered to me for ten cents on the dollar of the face when they were issued. It was the expectation of the people, and the agreement of the railroad companies to whom they were issued, that the railroad companies would pay them. The companies have all failed to do so.

47 Question by defendant. Was there ever any voting by the city of Watertown in relation to the issue of the $400,000 of bonds under the act of 1856?

(Plaintiff objects to any testimony in regard to the voting upon the issue of these bonds.)

Answer. Yes; there was, I think, very free voting. It was under an ordinance of the common council. A great number of laborers came in from the railroad and voted. The voting was largely done by laborers on the railroads, not residents of the city. My recollection is it was before the act authorizing the issue of the bonds passed. The foreclosures against the railroads have, I think, put it beyond the power of the city to enforce such agreements on their part to pay these bonds against these companies.

Cross-examined by Mr. Tenney for plaintiff:

I was the first mayor of the city, I think, in 1853. Have been mayor three times; was mayor last year. The principal of the city bonds of all kinds now outstanding is about $280,000. I think the highest assessment the city ever had was between $1,500,000 and $2,000,000, and that, I think, was in 1856 or 1857. The population of the city in 1856 was about the same as now, I think. A good many were then tempo-
48 rary railroad laborers, who have since gone. A good many prominent business men have also gone. The high assessment I spoke of in 1856 or 1857 was, I think, an over-assessment. The effect of the

large railroad indebtedness of the city is to depress real-estate value, and diminish the business prosperity and wealth of the city.

THEODORE PRENTISS.

Subscribed and sworn to before me this 21st day of May, 1872.

C. B. SKINNER,

U. S. Court Commissioner and Master & Examiner in Chancery.

Circuit court of the United States for the western district of Wisconsin.

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In equity.

I, Calvin B. Skinner, a court commissioner and master and examiner in chancery, duly appointed by the circuit court of the United States for the western district of Wisconsin, and qualified, hereby certify that pursuant to the foregoing and annexed testimony of Anton Franel, Charles Beekman, Michael J. Gallagher, and Theodore Prentiss,
49 was taken before me at my office in the city of Watertown, in the county of Jefferson, and State of Wisconsin, at ten o'clock in the forenoon of that day, to be used on the trial of the above-entitled cause on the part of said defendant; that H. W. Tenny, esq., one of the solicitors of record of said plaintiff attended at the taking of said testimony, and cross-examined said witnesses on behalf of said plaintiff, and D. Hall, esq., the solicitor of record *of record* of said defendant, attended and examined said witnesses on behalf of said defendant. That, before giving said testimony, said witnesses were severally duly sworn by me, according to law, as witnesses in said cause; that said testimony was by me reduced to writing as given by said witnesses, *and in their as given by said witnesses*, and in their presence and in the presence of the above-named solicitors for the respective parties. That upon the completion tion of the examination of each of said witnesses, his testimony as reduced to writing by me as aforesaid, was fully read over to such witness by me, and such witness thereupon signed the same at the foot of each page, and also at the end thereof; and that the foregoing and annexed is the testimony of such witnesses so given before me, and the whole thereof.

50 In witness whereof I have hereunto set my hand this twenty-first day of May, A. D. 1872.

C. B. SKINNER,

U. S. Court Commissioner & Master & Examiner in Chancery.

And now at this same term as first aforesaid, to wit, (June, A. D. 1872, term,) and on the 21st day thereof to wit, on the 10th day of July, A. D. 1872, as first aforesaid, the following proceedings were had, to wit:

JAMES H. REES
vs.
THE CITY OF WATERTOWN. } In equity.

This cause having been brought on to be heard upon the pleadings and testimony herein, and the same having been argued for and on behalf of the complainant by Mr. H. W. Tenney, and by Mr. Hall and Mr. Palmer for and on behalf of the defendant, and the court being fully advised of and concerning the several matters mentioned and set forth

in the said pleadings, and upon motion of Mr. Hall, solicitor for the defendant, it is ordered, adjudged, and decreed, and the court doth so order, adjudge, and decree that the bill of complaint herein be, and
51 the same is hereby, dismissed with costs. And on the hearing of said cause it occurred as questions:

First. Whether when the principal and interest on the bonds issued by the city of Watertown, as well as the judgment as stated in the bill, and there being no property on which to levy an execution, the plaintiff is confined to a remedy at law by mandamus or otherwise to enforce the payment of his judgment recovered in this court?

Second. Whether it was comp'tent for the court, as a court of equity, on the failure of the officers of the city of Watertown to levy the tax as required by law, referred to in the bill of complaint, through their neglect, refusal, absence, or resignation, to appoint the marshal of the court to levy and collect the tax to pay the judgment.

Third. Whether it was comp'tent for the court, as a court of equity, to subject the taxable property situate within the corporate limits of the city of Watertown in any way to an asssessment in order to pay the judgment of this court, referred to in the bill of complaint.

On said questions the opinions of the judges were opposed. Whereupon, on motion of the plaintiffs, by his solicitor, it is ordered that
52 the foregoing questions and the statement of facts, which is made under the direction of the judges herein, be certified according to the request of the plaintiff, to the Supreme Court of the United States. Whereupon the plaintiff, James H. Rees, at the time of pronouncing the foregoing decree, prayed an appeal in open court which was then and there granted & allowed him by the court, on giving bond and security in the sum of five hundred dollars, conditioned for the prosecuting his said appeal to effect, and answer all costs and damages if he shall fail to make good his said bill of complaint.

JULY 10, 1872.—And now on this day comes the plaintiff and files his bond on appeal as follows:

Supreme Court of the United States.

JAMES H. REES, COMPLAINANT,
vs.
THE CITY OF WATERTOWN, DEFENDANT. } In equity.

Know all men by these presents that we, James H. Rees, of the city of Chicago, as principal, and Samuel Johnker, as surity, are held and firmly bound unto the city of Watertown, in Wisconsin, in the sum
53 of five hundred dollars, to be paid to the said city of Watertown; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 10th day of July, A. D. 1872.

Whereas the above-named James H. Rees has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the western district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named James H. Rees shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then

this obligation shall be void; otherwise to remain in full force and virtue.

JAMES H. REES. [L. S.]
SAMUEL JOHNKER. [L. S.]

Sealed and delivered in presence of—
J. A. PHILIPS.

Approved July, 10, 1872.

J. C. HOPKINS,
U. S. Dist. Judge.

54 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, Frank M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office, being the record and papers in the case of James H. Rees vs. The City of Watertown, in equity.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said western district of Wisconsin, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-7th.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsement on cover:) No. 436. James H. Rees, appellant, vs. The City of Watertown. N. Wisconsin C. C. U. S. Filed 15th October, 1872.

SUPREME COURT

OF THE UNITED STATES.

NO. 219.

JAMES H. REES,
Appellant,

vs.

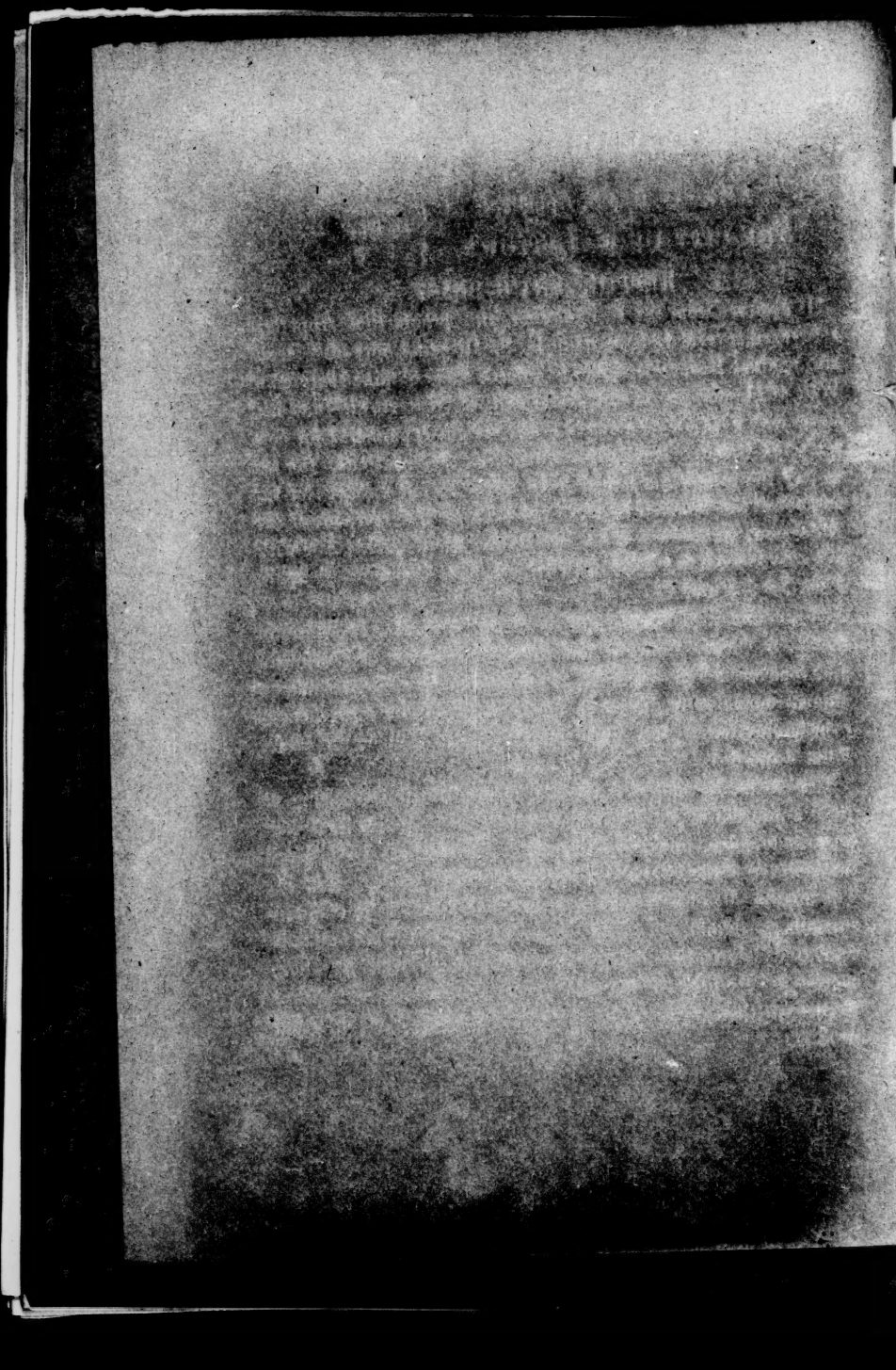
THE CITY OF WATERTOWN,
Respondent.

Appeal from the Circuit Court of the United States, of the ~~Northern~~ West District of Wisconsin.

RESPONDENT'S BRIEF.

D. HALL,
Sol. for Respondent.

H. L. PALMER,
Of Counsel.



Supreme Court of the United States.

JAMES H. REES, Appellant,
vs.
THE CITY OF WATERTOWN. } In Chancery.

RESPONDENT'S BRIEF.

It appears from the Bill answers and proofs that Appellant recovered several Judgments in U. S. Circuit Court of Wisconsin, against Respondent, and to enforce them obtained service of Writ of Mandamus on the Aldermen of Watertown—and had those who were disobedient to it and resigned, punished for contempt of Court. Notwithstanding their resignations, the tax to pay the judgments might have been levied except for the neglect of the Marshal to serve the writ on Halleger, one of the Aldermen, on account of his having the small pox. For with his vote there was still a quorum of the Common Council. Fols. 7-8-9-10and 11.

Appellant then brought suit on these several Judgments in the U. S. Circuit Court of the Western District of Wisconsin and recovered Feb. 3d, 1871, the Judgment to enforce which he almost immediately thereafter filed his Bill in this suit, without ever having taken any legal proceeding to collect the same. Fols. 1 and 6.

His excuse he alleges to be that only once in the spring of 1870 a quorum of the Common Council existed, and there had been none since, and that then such precautions were taken that service of the writ of Mandamus was impossible. Fol. 11, The answer denies these charges, fol. 27-8-34, and the evidence sustains the denial, fol. 39-40-1-2, and shows that there had been repeatedly since then a common council of Respondent whose meetings were held openly and that no precautions were taken to prevent the service of the writ of mendamus or of any legal process.

It would be tedious to explain all the laws complained of in the bill. But it is believed that the proposition upon them made in the brief below puts them out of the case, that none of them are in issue here.

The answer and proofs show that the indebtedness of Respondent is about seventy per cent. of the assessed value of all the property within its Corporate limits. That it was fraudulently voted on its people largely by non-resident Railroad laborers, and the bonds were sold at a about ten per cent. of their face. Fols. 39-40-45-6-7, and that a large share, ~~half~~ three fourths (¾) or two-thirds of the property in said City is exempt from all legal process. Fols. 43-4-5. That the collection of the whole debt by taxation is impossible. Fol. 46. But that efforts have been made to compromise it with partial success. Fol. 40, still leaving the per centage of indebtedness as above stated.

The Circuit Court announced upon overruling the demurrer to the bill that it was done with the distinct understanding that all questions raised by it were to stand open to be disposed of upon the final hearing.

The defenses set out in the answer are found at fols. 27 to 36, prominent among which—there being no law of Wisconsin, authorizing the relief here sought or giving any process for the same—*is the defense*, that the remedy demanded in the prayer of the bill stands prohibited by the exemption laws of the state, and especially by the exemption in Respondent's Charter, of all private property from seizure to pay any corporate judgment or debt under the which laws, still in force, all the bonds mentioned in the bill were issued. These exemption laws will be found set out in full at the end of this Brief.

The act for issuing these bonds was approved March 12th, 1856, Chap. 127, page 208 to 210, Priv. Laws, Wis. 1856, The City Charter was approved March 29th, 1856, Chap. 327, page 631 to 667, same volume of Priv. Laws, and the bonds were issued in June next following; testimony of Franel's, city clerk, fol. 38.

Supreme Court of the United States.

JAMES H. REES, Appellant,
vs.
THE CITY OF WATERTOWN. } In Chancery.

RESPONDENT'S BRIEF.

It appears from the Bill answers and proofs that Appellant recovered several Judgments in U. S. Circuit Court of Wisconsin, against Respondent, and to enforce them obtained service of Writ of Mandamus on the Aldermen of Watertown—and had those who were disobedient to it and resigned, punished for contempt of Court. Notwithstanding their resignations, the tax to pay the judgments might have been levied except for the neglect of the Marshal to serve the writ on Halleger, one of the Aldermen, on account of his having the small pox. For with his vote there was still a quorum of the Common Council. Fols. 7-8-9-10and 11.

Appellant then brought suit on these several Judgments in the U. S. Circuit Court of the Western District of Wisconsin and recovered Feb. 3d, 1871, the Judgment to enforce which he almost immediately thereafter filed his Bill in this suit, without ever having taken any legal proceeding to collect the same. Fols. 1 and 6.

His excuse he alleges to be that only once in the spring of 1870 a quorum of the Common Council existed, and there had been none since, and that then such precautions were taken that service of the writ of Mandamus was impossible. Fol. 11, The answer denies these charges, fol. 27-8-34, and the evidence sustains the denial, fol. 39-40-1-2, and shows that there had been repeatedly since then a common council of Respondent whose meetings were held openly and that no precautions were taken to prevent the service of the writ of mendamus or of any legal process.

It would be tedious to explain all the laws complained of in the bill. But it is believed that the proposition upon them made in the brief below puts them out of the case, that none of them are in issue here.

The answer and proofs show that the indebtedness of Respondent is about seventy per cent. of the assessed value of all the property within its Corporate limits. That it was fraudulently voted on its people largely by non-resident Railroad laborers, and the bonds were sold at a about ten per cent. of their face. Fols. 39-40-45-6-7, and that a large share, half or two-thirds of the property in said City is exempt from all legal process. Fols. 43-4-5. That the collection of the whole debt by taxation is impossible. Fol. 46. But that efforts have been made to compromise it with partial success. Fol. 40, still leaving the per centage of indebtedness as above stated.

The Circuit Court announced upon overruling the demurrer to the bill that it was done with the distinct understanding that all questions raised by it were to stand open to be disposed of upon the final hearing.

The defenses set out in the answer are found at fols. 27 to 36, prominent among which—there being no law of Wisconsin, authorizing the relief here sought or giving any process for the same—*is the defense*, that the remedy demanded in the prayer of the bill stands prohibited by the exemption laws of the state, and especially by the exemption in Respondent's Charter, of all private property from seizure to pay any corporate judgment or debt under the which laws, still in force, all the bonds mentioned in the bill were issued. These exemption laws will be found set out in full at the end of this Brief.

The act for issuing these bonds was approved March 12th, 1856, Chap. 127, page 208 to 210, Priv. Laws, Wis. 1856, The City Charter was approved March 29th, 1856, Chap. 327, page 631 to 667, same volume of Priv. Laws, and the bonds were issued in June next following; testimony of Franel's, city clerk, fol. 38.

I

Appellant has three remedies.

1st. By Writ of Mandamus and not by bill in Equity, Wakely vs. City of Muscatine, 6 Wall. 481.

2d. By action againsnt Aldermen of Watertown for neglect or refusal to levy tax and make payment. Amy vs. Supervisors, 11 Wall. 136, Farr vs. Thompson do 139.

3d. By execution, the law for which is exactly the same as when Applts. bonds were issued: Sec. 12, div. 9 of charter, Chap. 237. page 667, Priv. Laws, 1856, Wis. In sole reliance upon these remedies he bought his bonds. There being no law compelling the acceptance or retention of the office of Alderman to levy taxes to pay them, he took the chances of its being voluntarily done. He has every remedy he contracted for—all the remedies nominated in his bond. If these fail it is but a common experience. He must abide the risk he has taken. If any citizen of Watertown has invaded or refused his rights, let him make him defendent, and not exact a remedy, upon vague and general charges, which may involve the innocent with the guiltly without a hearing.

Appellant has not availed himself of either of his three remedies, to collect the judgment here sought to be enforced. Upon his prior judgments he avers that he did get service of the writ of mandamus, and that punishment for contempt of Court was inflicted for disobedience to it.

Not only does no insurmountable obstacle appear in the way of his remedies, but we think the proofs fairly negative the allegation of the Bill that any existed to the service of the writ of Mandamus, which proper diligence could not overcome.

Francl's Testimony Fols. 40-1-2.

II

If every averment of the Bill were true we insist that Appellant is not entitled to the remedy sought.

1st. The sole theory upon which this action is based, that a Court of Equity is bound by neither law nor precedent is incorrect. Story's Equity Jurisp., Secs. 6-11-12-13-14.15-18 and 19.

2d. There are no grounds for equity Jurisdiction here

There is but one Plaintiff and one Defendant, and but a single plain issue which must be decided all for Appellant or all for Respondent. It is but a simple naked, legal issue. And if the law does not give the remedy demanded, as the filing of this Bill and this whole record concedes, it is because the right to it in any form, does not exist:

3d. There is no pretext for the equitable jurisdiction, arising from a multiplicity of issues, and various and conflicting interests. If there was, the proper parties representing these interests, the taxpayers of the City of Watertown, are not before the Court.

4th. All the Court could do here would be to decree the payment of the Judgment and Appellant would end exactly where he began, with the same remedies which he had to enforce his contract Judgment debt, for money only, at law.

Equity Rule 8 of Circuit Court, Western District Wisconsin.

III.

The whole basis of the bill is that because Appellant has a judgment, it must be paid: That if he has exhausted all his known legal remedies, and failed, the Court is bound to find some method, outside of, beyond, and above, the law, and if

need be, in conflict with the law, to get him his money. He rests his whole case upon the maxim that "where there is a right there is a remedy." A mere truism which exhausts itself in the proposition that here both the right and the remedy are exactly what the law has made them. He must find his remedy within the law, and not beyond it.

A good deal was said in the Court below about the difficulty of enforcing the judgment by mandamus. A mere *difficulty* to enforce a right at law will not give a remedy in equity. Equity is liberal in the adaptation of her remedies. But these remedies must be such as will not transcend the limits of the law. Otherwise Courts of Equity would exercise an arbitratory and uncontrollable power, "and well deserve the spirited rebuke of Selden. 'For law we have a measure and we know what to trust to. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity.'" Storys Equity Jurip. Sec. 19.

But it is clearly a mistake that equity gives a remedy to every party in difficulty, unless his difficulty be covered by some specific ground of equitable jurisdiction. "The true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits in each particular class of cases falling within its remedial justice." Story's Equity Jurisp. 62.

And equity will not devise a new ground of equitable jurisdiction to enforce a cruel remedy because a speculator in public bonds is unlucky in his legal remedies, on the faith of which he invested his money, expecting *in this case a ten fold return.*

IV

The debt of the City of Watertown is a part of the public debt, exactly like that of the state and nation, and like them to be paid only by taxation. These are but larger political cor-

porations of the same essential nature. And if there is any force in the maxim that "where there is a right there is a remedy" against the City of Watertown, then it would have equal force against a state or the nation, in case of neglect or refusal to pay the public creditor.

V

To enforce this maxim Appellant avers and insists that the Corporate Authorities hold the property of the citizens in trust to pay the Corporate debts. It is true that in a private corporation the officers are trustees of an express trust, for the title of the property there vests in the legal entity known as the Corporation: And in case of the failure of the trustees, Equity will administer the trust estate and inforce all equitable liens upon it of creditors:

Curran vs. State of Arkansas 15 How 305-9-11.

But in a municipal Corporation private property vests entirely with the people: Their title is in no way affected by the existence or non-existence.of the Corporation. The debt is no lien upon it in law or in Equity: Destroy the Corporation and the debt is gone. The only question is whether the debt makes this corporation indestructible until it is paid.

Welch vs. Ste. Geneveve 10 Am. Law Reg. 512.

The debt is no breach of Covenants of Warranty in sale of Real Estate, nor does it interfere with sale or removal of personal property, or hinder the change of boundaries of the municipality. Cooley Const. Lim. 233 note. There are but three methods of divesting the owner of unincumbered property of his title.

First. By execution sale. But here all private property is exempt by law, as a part of the original contract. Sec. 9, chap. 9, of Charter, being chap. 327, Private Laws, Wis., 1856, p. 667.

Second. By condemnation for public use. This must be with compensation.

Third. By the power of taxation which can be exercised only in strict accordance with the letter of the written law. Blackwell's Tax Titles 1-23-26-33-35-37-39-50-55-56 61-2-3-4. Games vs. Stiles 14 Peters 328. Williams vs. Peyton's Lessees 4 Wheat, 79, and Witherspoon vs. Duncan 4 Wal. 217.

The R. R. Co. vs. Peniston, Trees Lincoln Co. just decided

VI.

The acts of the Legislature complained of involve no question in issue here. Many of them are repealed, some of them before the bill was filed. None now in force exceed the proper supremacy of the state over a municipality. The taxing power and sale of property under it, are substantially the same as when the bonds were issued.

Of such laws as are constitutional it is not for Appellant to complain. If any act did impair the obligation of his bond, it is void and his rights are to be enforced as if it had not been enacted. No penalty follows. Appellant cannot arraign Respondent here as a criminal nor the State of Wisconsin as a particeps crimenis, for a mistake of her Legislature.

VII.

The whole idea of a municipality is that it exists as an integral part of the State, as the great and efficient agency by which the government itself is carried on and maintained. Its powers are for public and for governmental purposes alone, a part of the State and National sovereignty. Hallam ascribes much of the freedom of modern civilization to municipal corporations. They are the machinery by which the Sovereignty acts. The City of Watertown is a fractional integer of the State of Wisconsin which is made up of like corporations. The power

of taxation is purely governmental, and uncoupled with any interest, it must be strictly complied with.

Blackwell's tax titles above cited. Games vs. Stiles 14 Peters 328 Amend 5 Const. U. S., Williams vs. Payton, 4 Wheat. 79, Witherspoon vs. Duncan, 4, Wall. 217, Trustees of Dartmouth College vs. Woodard, 4 Wheat. 518.

VIII.

But positive laws stand directly in the way of the Courts enenforcing the judgment either by way of tax or apportionate:

First. Defendants Charter confers the power of taxation solely on the Common Council and prohibits the levy of any tax except by the votes of at least eight Aldermen. A bare majority of a full Council.

Second. The general exemption law of the state, valid by our constitution as a fundamental right of the people and by the law of Congress making us a state under it, puts it beyond the power of the Courts to collect this judgment by tax or apportionment. The exemption is expressly from every process a Court can issue. The Marshal can take no property except by the process of the Court. Testimony of Beckman, Gallagher and Prentiss, Fols. 43 to 49, Sec. 17, Act. 1. Const. Wis., Secs. 23, 31, 2, Chapter 134 R. S. Apply the law of New England and still every homestead and all personal property exemptions would be respected within the indebted municipality.

Third. Defendants Charter exempts all private property from seizure on execution or sale (Chapter 237 Priv. Laws of Wisconsin 1856, Sec. 9 on page 667) in these words, "Nor shall any real or personal property of any inhabitant of said City or any individual or corporation be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city." Section 12 of same act, on same page, provides for issuing the execution. These provisions are in

full force. Francl's testimony shows, fol. 38, that Appellant's bonds issued under and subject to these provisions. As this was the only process by which a court had ever been known to take such property to pay a municipal judgment debt, the plain meaning of the exemption is that private property should never be taken by the direct process of the court. Defendant's case is far better than that of Margen vs. Beloit where this court refused the remedy here sought by Appellant.

Fourth. Chap. 114, of General Laws of Wis. of 1872 exempts all private property from everything that can be done under this bill. This law impairs no contract.

It simply enforces the very contract under which the bonds were issued. It takes away no known or existing remedy, and it is in harmony with both the letter and the spirit of all our legislation, and the decisions of all courts within Wisconsin, State and Federal. Since the issue was made, if any doubts existed as to the states and courts being governed by this law, it was but the rightful exercise of her supremacy over her municipalities, "of that sovereignty which she has never laid down," to settle that doubt. Cooley's Const. Lim. 287-8-9-93-4-233, note.

IX.

A Federal Court can reach property in this proceeding only by its process given to its Marshal. Under the various process acts, it has no jurisdiction of any process to enforce Appellants Judgment except such as the law of Wisconsin gives or such as is in use by her own state Courts. The only process within this category is the execution, from which all private property we have seen was exempted as a part of the bond itself. Raymon vs. Southerl, 10 Wheat 1, Bass vs. Darenel, 13 Pet., 45 U. S. in Knight 14 do 301, Riggs vs. Johnson, 6 Wall 192.

X.

The defect of parties Defendant leaves this Court without any jurisdictionover any private citizen, or his property. The Judgment and execution runs against the legal entity known as the corporation and its property alone, and not against the citizens of Watertown. Hence, the rule that would make citizens of an indebted municipality in New England, parties Defendant fails entirely here with the sole reason upon which it was based. Cooley's Const., Lim 245-6-7.

XI.

Besides in New England the judgment and execution being against all property in the municipality indiscriminately and alike left no judicial question to be determined, as would exist here in determining each tax payer's pro rata share, upon which he is entitled to his day in Court, and to which judicial question cannot be delegated to the Marshal. Hence if we are correct in this position, any decree here to take private property would be Coram non judice, and the Marshal in executing it would be a trespasser. Cooley's Const., Lim 245-6-7.

In a private or aggregate corporation a suit against it is not a suit against the stockholders. If they are liable to contribute to pay judgments, they have to be brought into court in order that the amount each one must contribute may be adjudicated. In the case at bar the same necessity of judicial determination would exist.

XII.

The only case in which this Court ever authorized a levy of a tax, was a proceeding at law, and it said that the power to do it "Depends upon a provision of the Code of Iowa," 7 Wal. 175 and 180.

XIII.

The Appellant concedes that the Court could not levy a tax or through its own officers wield the taxing power. But he asks that either there may be a general and indiscriminate seizure of private property to pay his judgment, for which the only process the Marshal could have, would be the execution to which no exemption applies, or that the Marshal may under the direction of the court, apportion this debt among the tax payers and collect it, which after all would be taxation, and shows that he seeks to get his money by the thin disguise of a simple misnomer. For if it is to be merely an apportionment in any proper sense of the term, and not taxation, the proper parties against whom it is to be made are not in Court; and would have the right to have their share judicially determined, and when done, each one would have his exemption, which is the most perfect answer to this bill, for under the answer and proofs, the court cannot do Equity here. Fols. 33-43-4-5.

XIV.

The only instance known in the absence of an express statue, like that of Iowa, in which a court wielded the taxing powers is Welch vs. Ste. Genevene 10 Am. Law Register 512. This was a proceeding at law, and if right, then Appellant has an Adequate Remedy at Law, and his bill stands prohibited by the 16th Sec. of the Judiciary Act of 1789. But we maintain that this right or remedy exists neither at law nor in Equity. In support of its order directing the Marshal to levy the tax, that Court cites none but cases turning entirely upon the Iow statute, and its decision was but the assertion of an arbitrary and unwarranted authority in the Court.

XV.

There were not only precedents for the warrant of Charles

I. for ship money, but the Courts adjudged it legal. It was right that the public creditors should be paid, "and where there was a right there was a remedy." But the response to it of the men of England's Commonwealth, as well as the cause of our own Revolution, ought to satisfy every one that in Anglo Saxon lands, taxation must not only be with representation, but that whoever wields this summary power to take private property, must find his warrant in the letter of the written law.

XVI.

We respectfully submit whether in the light of this Record, in open disregard of these most memorable events in the history of our race and nation, the Courts should overturn the fundamental principles of our government, by usurping a power it was never intended they should wield, and from the exercise of which they have always been strictly prohibited.

Because Aldermen of Watertown resign, their exclusive power of taxation does not gravitate to or devolve upon the Circuit Court of the Western District of Wisconsin, anymore than the exclusive jurisdiction of that Court would devolve upon and become vested in this Court in case of the resignation of the Circuit Judges.

The legislature alone holds the remedy at its disposal.

D. HALL,
Sol. for Respondent.

H. L. PALMER,
Of Counsel.

The following are the general exemption laws of Wisconsin cited in the Brief.

Article 1, Section 17, of the Constitution of Wisconsin:

The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debtor liability hereafter contracted.

Revised Statutes of Wisconsin, Chap. 134, Sec. 23.

A homestead, consisting of any quantity of land not exceeding forty acres, used for agricultural purposes, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any town-plat or city, or village, or instead thereof, at the option of the owner, a quantity of land, not exceeding in amount one fourth of an acre, being within a recorded town plat, or city, or village, and the dwelling house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability contracted after the first day of January, in the year one thousand eight hundred and forty-nine.

Revised Statutes of Wisconsin, Chap. 134, Sec. 31.

No property hereinafter mentioned or represented, shall be liable to attachment, execution or sale, on any final process issued from any court in this state:

1. The family Bible.
2. Family pictures or school books.
3. The library of the debtor: but this provision shall not be deemed to extend to circulating libraries.

4. A seat or pew in any house or place of public Worship.

5. The right of burial of the dead.

6. All wearing apparel of the debtor and his family; all beds, bedsteads, and bedding kept and used for the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils, and all other household furniture not herein enumerated, not exceeding two hundred dollars in value.

7. Two cows; ten swine; one yoke of oxen and one horse, or in lieu of one yoke of oxen and a horse, a span of horses; ten sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, one plough, one drag and other farming utensils, including tackle for teams, not exceeding fifty dollars in value.

8. The provisions for the debtor and his family, necessary for one year's support, either provided or growing, or both, and fuel necessary for one year.

9. The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value; the library and implements of any professional man, not exceeding two hundred dollars, in value; all of which articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, servant, clerk, or legal representatives, as the case may be.

10. All moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire.

The provisions of the Charter of the City of Watertown found on page 667 of private laws of Wisconsin, 1856, cited in Responeent's Brief subject to which Appellant's Bonds were issued, and which take this case out of any general rule are as follows, to-wit:

"Sec. 9. Said city may lease, purchase or hold real or personal property sufficient for the convenience of the inhabitants thereof, anc may sell and convey the same, and the same shall be free from taxation; nor shall any real or personal property of any inhabitant of said city, or any individual or corporation be levied upon or sold by virture of any execution issued to satisfy or collect any debt, obligation or contract of said city."

"Sec. 12. When any judgement shall be recovered against the city or any ward thereof, or against any city or ward officer, in an action persecuted by or against him in his name of office, when the same should be paid by the city, no execution shall be awarded or issued upon such judgment except as herein provided, but the same, unless reversed, shall be levied and collected as other city charges are collected, and shall be paid by the city treasurer to the person to whom the same shall be adjudged, upon the delivery of a proper voucher thereof, but if payment thereof be not made within sixty days after the city treasurer is required to make his returns of City and Ward taxes, next after the rendition of such judgment, an execution may be issued thereon, upon the order of the court authorized to issue such execution on special application therefor."

D. HALL,
Sol. for Respondent.

H. L. PALMER,
Of Counsel.

Supreme Court

OF THE UNITED STATES.

JAMES H. REES,

Appellant,

vs.

THE CITY OF WATERTOWN,

Respondent.

APPELLANT'S BRIEF.

H. W. & D. K. TENNEY,

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S. U. PINNEY,

Of Counsel.

Supreme Court of the United States.

JAMES H. REES,
Appellant
vs.
THE CITY OF WATERTOWN,
Respondent.
} *In Chancery.*

APPELLANT'S BRIEF.

This case comes to this court from the Circuit Court of the United States for the Western District of Wisconsin, upon a certificate of a difference of opinion on the part of the Judges thereof.

The bill filed charges that the plaintiff recovered four several judgments against the respondent in the Circuit Courts of the United States for Wisconsin, in all for the sum of $11,066.89, upon coupons attached to bonds issued by said city. That several executions were issued upon said judgments, all which were returned unsatisfied for the reason that no property could be found whereon to levy. That several writs of mandamus were thereafter issued by said court,

commanding the proper officers of said city to levy and collect a tax to pay said judgments. That said writs were rendered entirely nugatory and unavailing by the resignation of the officers of said city, and divers contrivances of that sort, systematically pursued, by which it was so arranged that there were no officers in existence capable in law of levying a tax. That at the time of filing the bill, and for a year and a half before, except upon one day, there had been no such officers. That the city had procured the passage of numerous laws by the state by which it was enabled to exist and carry on its ordinary business without having any officers in law capable of levying a tax, and by which instantaneous resignations could be effected, and the service of a mandamus or obedience thereto could be effectually prevented. That nothing had ever been paid on said indebtedness, and the city and citizens had at all times announced their determination never to pay anything thereon, or to raise any tax for that purpose. The complainant thereupon says he is remediless at law, and for that reason he asks the court to devise an effectual remedy, by which the court, through its own officers, shall subject the taxable property of said city to the payment of said indebtedness.

To this bill a general demurer was filed, which, after argument, was overruled by Judge Drummond.

The defendant than filed an answer, admitting most of the allegations of the bill, but making some denials and limitations, none of which affect its main scope or the questions now presented.

The complainant filed a general replication.

Testimony was taken giving the certainty in regard to the general allegations as to dates, amounts, &c., and the times when there was and was not a Board of Aldermen capable of levying a tax, but not varying the case otherwise.

The case was tried in June, 1872, at Madison, Wisconsin, before Hon. Judges Drummond and Hopkins, and upon their difference of opinion thereon the bill was dismissed, and the complainant duly appealed to this court. The following are the questions upon which said difference occurred, as certified by said Judges, to wit:

1. Whether, when the principal and interest on the bonds issued by the City of Watertown were unpaid, as well as the judgment, as stated in the bill, and there being no property on which to levy an execution, the plaintiff is confined to a remedy at law by mandamus or otherwise, to enforce the payment of his judgment recovered in this court.

2. Whether it was competent for the court, as a court of equity, on the failure of the officers of the City of Watertown to levy the tax as required by law, referred to in the bill, through their neglect, refusal, absence or resignation, to appoint the marshal of the court to levy and collect the tax to pay the judgment.

3. Whether it was competent for the court, as a court of equity, to subject the taxable property situate within the corporate limits of the City of Watertown, in any way, to an assessment, in order to pay the judgment of this court referred to in the bill of complaint.

We assign as error that the court dismissed the bill, when it ought to have given us the relief prayed for.

It will be seen that the questions upon which the difference occurred go to the whole scope and theory of the bill, and are the same that were at first presented by the general demurrer.

The theory of the bill is as simple as it is radical. It is this: The complainant having established a clear legal right at law, and having demonstrated that he has no remedy at law, it is the duty of

the court of equity to devise and enforce an effectual remedy, which must be done through its own officers, because there are no others in existence capable of it.

The opposite theory is that the court can only command existing city officers to execute existing state tax laws, and if there are no such officers, the end of judicial power is reached.

We are aware of the gravity and delicacy of the questions presented. For on our part we assert the right of a United States court to take possession of a city and sell it in its own way, without regard to state laws or state officers. And on the other side, the claim is that the United States court is powerless in this case to execute its judgments except through instrumentalities provided by another sovereign, and that, these being withdrawn, the city may safely and effectually repudiate its debt. Nevertheless the question is forced upon us, and it is highly important that we and all others similarly situated, as well as all defaulting municipalities, should know what their rights and remedies are in such a case.

We presume the first of our premises will not be questioned, to wit: that we have established a clear legal right. The courts have so adjudged four times.

The second of our premises seems also free from doubt. We have in good faith, through several years, tried with diligence every resource of the law, but without any effect, and now and for a long time past there are no officers in existence capable of executing the command of the court to levy a tax, and the city has no property subject to execution. What is our remedy at law, if we have one? Shall we issue another mandamus? The former ones proved to be as vain as commanding "leviathan to come ashore," and now there is no leviathan to command. Should we wait, expecting that at some future time the city will voluntarily put itself within the reach of a mandamus? We

know well they will never do it, for even to this time they are persisting in the same course, and they will not voluntarily defeat their own settled policy. And this being compelled to wait for the voluntary action of the city is not legal redress, but rather the denial of it. It seems plain to us that any further attempt at law would not only be fruitless to us, but would bring the court into ridicule.

And then comes the important question whether, all legal remedies failing, the court of chancery can give us a remedy. This involves the original and ultimate powers of the court. And it seems to us that from the composition, objects and whole history of the court of chancery, the power and duty to give such remedy follow from the recited premises. We here seem to encounter the difficulty of demonstrating a self-evident proposition. The books are full of such statements as this, from 1 Story's Eq. Jur., § 33.

"Perhaps the most general, if not the most precise description of a court of equity, in the English and American sense, is, that it has jurisdiction in cases of rights recognised and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law."

Looking through the specific enumeration of the cases in which equity acts, we find nothing substantially limiting this statement, or taking our case out of it. The very ground of its jurisdiction is that there is a legal right and no legal remedy, and by necessity the jurisdiction must be co-extensive with the reason. *Ubi eadem ratio ibi idem jus.* Finding that the general words and the reason of the law cover our case, and finding no limitation thereon, we may well stop and challenge our opponents, as we do, to show where any limitation has been made, and why it should be, to prevent the court from giving us redress in this case, as it does in others upon the same reason. Here is legal right and no legal remedy. If that ever gives jurisdiction, why not in this case? If the court *generally* takes jurisdiction on that ground, what is there to make this an exception?

Will it be said that in other cases there is a practicable remedy which the court can devise and enforce, but not in this? The persons and the property chargeable with this debt are within the territory habitually traversed by the marshal, and so within the reach of the court. The number of persons interested in resisting the execution of the decree of the court is not so great but that the court can summon to its aid a hundred fold to execute it. The thing to be done is not so complex or extensive but that the court can handle it properly. Courts have often handled larger and more difficult matters. Wherein, then, is the difficulty? It seems to us that "it is easier to do this thing than to say it."

Are the proper parties before the court to entitle us to the relief we ask? The defendant is the same that contracted the debt. It is the same that was charged with the duty of paying it, and which alone had the power to take the property of the citizens for that purpose. It is the embodiment of the citizens to act for them in this matter, made and unmade by them at their pleasure, so far as filling the offices and controlling their action is concerned. It had authority to borrow the money for the citizens, to spend it for the citizens, and to defend against the payment of it at the expense of the citizens. In short, it had ample and exclusive authority to represent the citizens at every stage. The citizens are a numerous and fluctuating body, whom it would be impracticable to bring into court, and merely as representatives of a class, the officers upon whom the law requires process to be served, and whose duty it is made to take action in regard to it, have shown by their diligence that they are sufficient for that purpose.

It may be said that we hold in substance only a contract that the city officers will levy a tax for our benefit, and that the court has no power except to compel a specific performance of this agreement. Such was not the contract. The gist of the contract was to repay the money borrowed, and to this the contract to raise a tax was subsidiary.

We are not seeking a specific performance through the means appointed, knowing it cannot be had, but, as in a creditor's bill, are seeking to reach assets in equity which cannot be reached at law. The case is the same as if any ordinary debtor, at the time of contracting his debt, had agreed that he would raise the money to pay it in a particular way, and then had disabled himself from raising the money in that way, having ample funds otherwise.

It may be said that the relief we ask involves an exercise of the taxing power, and that this is not a judicial power. We do not ask the court to exercise the power of taxation, and we are compelled to think that in the proper sense of the word, it does not possess it. In some analagous cases courts have spoken of "ordering the marshal to levy a *tax*," &c., and one of the questions certified here is, whether the court has power to appoint the marshal to levy and collect the *tax* which the city officers ought to have levied and collected. This seems to us to make it necessary to discriminate accurately the taxing power from that which we invoke. The original meaning of the word *tax* is *to arrange*, or *apportion*, as we use it in speaking of the "taxation of costs." In that sense, of course all courts possess it. In that sense, if there were a common debt chargeable upon numerous tracts of land, and the court should apportion it and fix upon each the amount due from it, it might be called *taxation*. But that is not the sense in which the word has figured most in the law, or in regard to which any question could be raised. It is ordinarily used in speaking of public revenue. Blackwell says, (Tax Titles p. 1)

"Taxes are defined to be the burdens or charges imposed by the legislative power of a state, upon persons or property, to raise money for public purposes."

In this ordinary sense of the word it seems to us the court does not possess the taxing power. It is a legislative power, and can only be exercised under and by virtue of that power, and by the particular

officers and in the particular manner provided for by the legislature. Being exercised *in invitum*, the utmost strictness in this respect is required and any deviation is fatal. No substitution or equivalent is allowed. The power of the taxing officers comes from the sovereignty appointing them, and if the offices are vacant another sovereignty has not the power to fill them. The United States cannot make a state officer. The United States court cannot make a state officer of Wisconsin, which the constitution and laws of Wisconsin declare can only be made by popular election. The state tax laws can only be executed by state officers, made such by the state, and deriving their powers from it. And thus we abandon the idea that the United States court has the taxing power, or the power to provide the machinery for levying and collecting taxes by the authority of the state.

But, happily, the power we invoke and the rights we claim are simpler than all this. We say the court has *jurisdiction* of the persons and the property in question, and of the case, and that it can, in any way its wisdom may approve, subject the taxable property of the City of Watertown to the payment of our debt, without the intervention of state taxing officers, and without regard to tax laws. The court has the subject matter within its reach, and the persons representing it before its bar. It has ample property in sight, out of which it has adjudicated that this debt should be paid. It can see no restriction upon its power to lay hold of it and apply it to that purpose. Why should it fail to execute justice in the matter? The court constantly hears controversies as to the title to lands, or the existence of liens or charges upon them, or equities respecting them, and finds no difficulty in handling the matter by its own officers, by sale, or passing of title, or otherwise, so as to accomplish what it has determined that justice requires. If an equitable charge existed against a tract of land owned in severalty by a thousand different persons, the court would not defeat the charge nor refuse jurisdiction because of the difficulty of settling the equities between so many defendants That seems to us the only

difficulty here, and not a very great one. And considering that the parties interested have by their own wrongful acts prevented the payment of this debt by the levy of a tax, which would have settled the equities between them perfectly, it seems to us that we should not be delayed, much less defeated, by this difficulty.

It may be proper that we should state more specifically what remedy we think the court should give us. It might be something like this: The court might make a decree subjecting the taxable property of the City of Watertown to the payment of this debt, and ordering the marshal to make a list thereof from the best sources he could obtain, and as nearly as convenient like the last assessment roll, the same to be reported to the court. The court might then hear and settle objections to this list, apportion our claim upon the items thereof, as valued, and order the marshal to collect from each person or piece of property the amount apportioned thereto, or in default, to sell the property, or levy on the property of the persons in default, in the main following the analogy of the tax laws, but not too literally. In all the proceedings these things should be kept in mind: first, that the principal object is to give the complainant a simple and effectual remedy; second, that the proceedings should be wholly in the control of the United States court, and should not depend on the actions of any state or city officers; third, the state tax laws should be disregarded as a source of authority, and regarded as an analogy only so far as convenient; fourth, that anything done for the purpose of settling equities between the defendants in interest is only a matter of grace, and should not be allowed to work any substantial injury to the complainant.

We suppose the court might order the money to be made out of any of the taxable property in the city, leaving the citizens to settle the equities between themselves at their leisure, and perhaps that would be the best way.

We have not been able to find any reported case in which the facts and the theory of the case are the same as in this, and for that reason we have not been able to make a very pertinent citation of authorities. We suppose the case to turn upon principles too simple and elementary to require citations. The case of *Welch vs. St. Genevieve*, 1 Dillon, C. C. 522, is most like it. In that case the court, in a mandamus case, ordered the marshal to levy and collect a tax to pay the debt. There was no state statute authorizing it. In *Supervisors vs. Rogers*, 7 Wall, 175, the court issued a mandamus to the marshal "commanding him to levy and collect the taxes named in said peremptory writ," &c. But there was a state statute authorizing the court to "direct that the act required to be done may be done by the plaintiff or some other person appointed by the court," and the proceeding was probably founded upon that. In *Dillon on Municipal Corporations*, p. 646-7, and notes, the cases in which such proceedings have been had are collated and commented on. Among others, the case of *Morgan vs. Beloit* is referred to, in which it appears that the second of the questions here presented was once argued before this court, and the court were equally divided. But we understand that the theory and the prayer of the bill in that case were radically different from ours. If we are correctly informed, that difference may have controlled the disposition of the case.

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